Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1545

AMSTAR CORPORATION,
Petitioner,

versus

SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF CASE

Petitioner's statement of the case is correct with one minor exception. Petitioner has claimed that the amount of profit included in the sale price of the damaged sugar amounted to $7,529.28. Petitioner goes on to state that there is no dispute between the parties as to this amount. [Petition for Writ of Certiorari at 3 n. 1.] Although respondent has developed no

evidence indicating that this figure is incorrect, respondent nevertheless has not stipulated to its correctness. Petitioner is correct, however, in pointing out that there is no dispute between the parties that the cost of reprocessing the sugar for resale to another customer amounted to $488.65. Furthermore, respondent has always assumed that the amount of profit on the completed sale of sugar exceeded the sum of $488.65, even if the $7,529.28 figure should be incorrect.

Respondent was fully aware at all times that petitioner desired and intended to appeal from that portion of the consent judgment that awarded damages on the basis of petitioner's reprocessing costs. Respondent did not, however, investigate to determine whether the procedure employed was effective to preserve petitioner's rights on appeal.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the considerations governing review on certiorari indicate that there are no special and important reasons for the issuance of a writ in this case. In particular, the decision below is consistent with the prior decisions of this Court and is consistent with the prior decisions of other courts of appeals. Moreover, the lower court has not so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. The decision below does not conflict with prior decisions of this court.

Petitioner incorrectly argues that the decision below conflicts with prior decisions of this Court. In fact, the cases referred to by petitioner stand for the general proposition that "a decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause." *Swift & Co. v. United States*, 276 U. S. 311, 324, 48 S. Ct. 311, 314, 72 L. Ed. 587, 596 (1928); *Nashville, C. & St. L. Ry. v United States*, 113 U. S. 261, 266, 5 S. Ct. 460, 462, 28 L. Ed. 971, 973 (1895). *See Pacific R. R. v. Ketchum,* 101 U. S. (11 Otto) 289, 295, 25 L. Ed. 932, 935 (1880).

Petitioner suggests that the three cases cited above involved a review by this Court of consent judgments entered by the lower courts. On the contrary, the *Nashville* decision involved a review of the lower court's dismissal of the lawsuit. The suit was dismissed on the grounds that a consent judgment entered in an earlier proceeding between the parties barred the plaintiff's claim, and this Court affirmed the dismissal. This Court did not review the consent judgment itself, nor did any of the parties contend that there was a lack of actual consent to that judgment.

The *Swift & Co.* decision involved a review of the lower court's denial of two motions to vacate a consent judgment, which motions had been filed more than four years after the entry of the consent judgment. None of the parties in that case contended that there was a lack of actual consent to the judgment, but contended only that the judgment should be vacated for lack of jurisdiction. This Court affirmed the denial of the motions to vacate and did not review the consent judgment itself, other than to the extent that it was necessary to do so to determine whether the lower court had jurisdiction.

In *Ketchum*, this Court affirmed the decree below, but without actually reviewing the terms of the consent decree itself. The most serious issue on appeal was, once again, whether the lower court had jurisdiction to enter the consent judgment. The appellant in *Ketchum* did, however, assert that there was a lack of actual consent to the judgment on the grounds that its solicitor had no authority to consent to the judgment on behalf of the appellant. This Court held that where it appeared on the record that the appellant had consented to the judgment, any relief based upon a lack of actual consent would have to be obtained in the court of first instance.

In the present case, petitioner freely acknowledges that it consented to the entry of the judgment below and that the trial court had jurisdiction to enter the judgment. Petitioner contends only that its consent was limited by an express reservation of its right to appeal from the judgment. In *Ketchum*,

this Court held that a right of appeal exists with respect to a consent judgment that is otherwise appealable. *Pacific R. R. v. Ketchum,* 101 U. S. (11 Otto) 289, 295, 25 L. Ed. 932, 935 (1880). The Court further held that even though a right of appeal exists, the judgment must be affirmed where it appears from the record that the appellant consented to the judgment.

Accordingly, the decision below is consistent with the holding in *Ketchum* and with the dicta in *Swift & Co.* and *Nashville.*

Petitioner goes on to suggest that the decision below conflicts with this Court's decision in *United States v Hougham,* 364 U. S. 310, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960). The rule in *Hougham* is that acceptance of the benefits of a judgment does not preclude an appeal on the grounds that the judgment was inadequate. In the present case, respondent has paid the judgment in full and a satisfaction of judgment has been made a part of the record.

The decision below makes no reference to the fact that petitioner has accepted any benefits under the judgment. There is no indication that this factor influenced the court of appeals in any respect in its deliberations. The decision below was predicated solely upon "the fact that both parties freely consented to the entry of a final judgment." *Amstar Corp. v. Southern Pacific Transport Co.,* 607 F. 2d 1100 (5th Cir.

1979). Accordingly, there is no inconsistency with the *Hougham* decision.

II. The decision below does not conflict with the decisions of any courts of appeals, including the Court of Appeals for the Fifth Circuit.

Petitioner argues that the decision below conflicts with the decisions of several of the courts of appeals, including the Court of Appeals for the Fifth Circuit, insofar as the decision rests upon petitioner's acceptance of benefits under the judgment. This is indentical to the argument advance by petitioner with respect to the *Hougham* decision. As shown above, there is no reference by the court below to the fact that petitioner received any benefits under the judgment. The court below based its decision on the fact that the parties had consented to the entry of the judgment.

Petitioner has emphasized that the court below referred to the case of *White & Yarborough v. Dailey*, 228 F. 2d 836 (5th Cir. 1955), in its opinion. Petitioner correctly points out that the *Dailey* decision was based in part upon the fact that the appellant had accepted certain benefits under the judgment. In *Dailey*, however, the court squarely held that "Appeals cannot be taken from agreed judgments such as this one was, and, for that reason alone, the appeal fails." *Id.* at 837. Since the court below in the present case made no reference to the fact that the judgment had been paid, it should be obvious that

the court relied upon the *Dailey* decision because of the statement just quoted, and not because of any reference to the appellant's acceptance of benefits under the judgment.

III. The court below has not so far departed from the accepted and usual course of judicial procedings as to call for an exercise of this Court's power of supervision.

Petitioner argues that the decision below is clearly erroneous because petitioner would not have consented to the entry of judgment in the absence of a reservation of its right to appeal. The question at this point, however, is not whether the court of appeals has carried into effect the intent of the parties, but whether the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a) (effective June 30, 1980, formerly Sup. Ct. R. 19). Petitioner has failed to show such a departure from the accepted and usual course of judicial proceedings in this instance.

Irrespective of the parties' actual intent, where it appears from the record that the parties have consented to the entry of a judgment, the judgment must be affirmed on appeal provided the lower court had jurisdiction to enter the judgment and provided was no fraud in its procurement. *Swift & Co. v. United States*, 276 U.S. 311, 48 S. Ct. 311, 72 L. Ed. 587

(1928); *Nashville, C. & St. L. Ry. v. United States,* 113 U.S. 261, 5 S. Ct. 460 28 L. Ed. 971 (1895); *Pacific R. R. v. Ketchum,* 101 U.S. (11 Otto) 289, 25 L. Ed. 932 (1880); *Thonen v. Jenkins,* 455 F.2d 977 (4th Cir. 1972); *SEC v. Dennett,* 429 F. 2d 1303 (10th Cir. 1970); *Martin Marietta Corp. v. FTC,* 376 F.2d 430 (7th Cir.), *cert. denied,* 389 U.S. 923, 88 S. Ct. 237, 19 L. Ed. 2d 265 (1967); *Stanford v. Utley,* 341 F.2d 265 (8th Cir. 1965); *White & Yarborough v. Dailey,* 228 F.2d 836 (5th Cir. 1955); *Kelly's Trust v. Commissioner,* 168 F.2d 198 (2d Cir. 1948).

The decision by the court of appeals in this case does not represent a departure from the foregoing rule, and this Court's power of supervision therefore should not be invoked.

CONCLUSION

Petitioner has failed to show that there are special and important reasons in this case for reviewing the decision below on writ of certiorari. More particularly, the question has already been settled by this Court; the decision by the court of appeals does not conflict with a decision of this Court, nor does it conflict with the decision of another federal court of appeals on the same matter; and the court of appeals has not so far departed from the accepted and usual course of judicial

proceedings as to call for an exercise of this Court's power of supervision. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of July, 1980, three copies of the foregoing brief were hand delivered by undersigned counsel to Harry McCall, Jr., of Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First NBC Building, New Orleans, Louisiana 70112, counsel for petitioner.

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